90-1640

No.———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM M. CHURCH,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

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APRIL 1991

QUESTION PRESENTED

Whether the petitioner was denied due process of law under the Fifth Amendment to the United States Constitution when the Court of Military Appeals held the evidence was sufficient to support the petitioner's conviction of attempted premeditated murder, without reference to any military necessity and on statutory language similar to that of other jurisdictions holding the same evidence constituted only the lesser offense of solicitation.

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---

PETITION FOR A WRIT OF CERTIORARI

The petitioner, William M. Church, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on January 28, 1991.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 32 M.J. 70 (C.M.A. 1991) (Appendix A). The United States Air Force Court of Military Review issued a decision on October 26, 1989, reported at 29 M.J. 679 (A.F.C.M.R. 1989) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on January 28, 1991. The jurisdiction of this Court is invoked under Article 67a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C.

§ 867a (Supp. 1989) and 28 U.S.C. § 1259(3) (Supp. 1989).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall be . . . deprived of life, liberty or property, without due process of law . . .

Article 80, UCMJ, 10 U.S.C. § 880 (1988), provides in pertinent part:

> An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

Article 134, UCMJ, 10 U.S.C. § 934 (1988), provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

STATEMENT OF THE CASE

This case involved petitioner's solicitation of an undercover agent of the Air Force Office of Special Investigations (AFOSI) to murder petitioner's estranged wife. Since the posture of this case requires review of the facts in the light most favorable to the Government, the facts are so presented herein.

Petitioner and his wife were separated, and his wife won custody of their 20-month old son. Desperately want-

ing custody of his son, petitioner began looking for someone he could hire to murder his wife. He asked several friends, who while initially believing his request to be made in jest, eventually took him seriously and reported the matter to the AFOSI. The AFOSI then planned a detailed undercover investigation, placing an undercover agent in the role of "hit man."

Special Agent Nicholas Karnezis, or "Nick" as he was known to petitioner, contacted petitioner and arranged for the two of them to meet at a nearby motel. They agreed petitioner should bring a photo of his wife, maps of the area where she was living, and a layout of the house. Petitioner was to wear a red football jacket and carry a *Time* magazine so the agent would be able to recognize him. At their meeting, which was both videotaped and audiotaped, petitioner told the agent he wanted the agent to kill his wife. He provided the agent with partial payment, expense money for the round trip flight to Michigan, photos of his wife and son, maps of the area, and a notebook with floor plans of the house. He agreed to pay the agent the remainder of the money when the job was completed. The agent produced a .22-caliber semi-automatic pistol with silencer, suggesting it be used as the murder weapon. The petitioner responded "Yeah, that's fine." Petitioner was to make himself conspicuous at work at the time of the killing to provide the alibi.

Two days later, the agent called petitioner from Michigan with the news that petitioner's wife had moved and that it would cost more to locate her and accomplish the job. Petitioner was apologetic and promptly agreed to pay the additional money. The following day the agent called and informed him he had located petitioner's wife and the job would occur sometime between then and the next morning. Petitioner responded affirmatively.

Within two days, the petitioner was notified by his Squadron Commander that his wife was dead. Petitioner put on a "class A act" when he received the news. That

same day he was told by the undercover agent to meet him at the motel. The petitioner arrived, and the agent showed him a photograph of his wife's body, staged to make it appear she was dead. Petitioner identified the photo as that of his wife. He expressed satisfaction with the job done and paid the agent the additional money, after which the agent identified himself as an AFOSI agent and arrested the petitioner.

Petitioner was charged with and found guilty of the attempted premeditated murder of his wife by "procuring, assisting and counseling Nicholas J. Karnezis to commit, for payment in U.S. currency, the premeditated murder of the said Mary M. Church." The petitioner was sentenced to ten years confinement, a dishonorable discharge, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.

In its opinion below, the Air Force Court of Military Review noted that under military law, a "direct movement toward the commission of the offense" is required for a criminal attempt. The Court also cited ¶ 4c, Part IV of the Manual for Courts-Martial (M.C.M.), United States, 1984, for the proposition that, "soliciting another to commit an offense does not constitute an attempt." *United States v. Church*, 29 M.J. 679, 685 (A.F.C.M.R. 1989). Nevertheless, applying the test in *United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987), the Air Force Court found petitioner's acts of hiring Special Agent Karnezis, paying him, and providing him with information necessary to commit the offense constituted a "substantial step toward commission of the crime." *Byrd, supra.*

The United States Court of Military Appeals also concluded that petitioner did everything he "*thought* not only necessary but possible to make the enterprise successful." *United States v. Church*, 32 M.J. 70, 73 (C.M.A. 1991) (emphasis added). The Court thus found the evidence sufficient for a rational factfinder to conclude, beyond a

reasonable doubt, that petitioner's actions exceeded mere preparation.

REASONS FOR GRANTING THE WRIT

The writ should be granted to resolve the divisive split in the courts on the issue presented. The split is acknowledged in the opinion of the court below. 32 M.J. at 72 n.5. The court below appears to resolve the split on two improper bases.

The primary thrust of the opinion below seems to indicate that the sentence maximum was a major determinant in the court's decision. Thus the court acknowledged at the outset that,

> The real stake in this appeal is the sentence. If as appellant contends, he is merely guilty of soliciting murder, the most he can be confined is 5 years. If, however, he is guilty of attempted murder the maximum confinement is 20 years, with the result that his approved sentence would stand.

32 M.J. at 70-71 n.1.

Later the court underscored their approach by revealingly highlighting a section of text from R. Perkins & R. Boyce, *Criminal Law* 621 (3d ed. 1982):

> The preparatory-perpetrating dichotomy is useful in discussing situations of a rather general nature, but the actual dividing line between the two is shadowy in the extreme. *There is reason to believe that in close cases the decision is based upon other considerations and that the label attached is that appropriate to the conclusion reached—after it is reached.*

32 M.J. at 72 (emphasis as supplied by the court below).

Again, at the conclusion of the court's opinion the theme is pulled full circle, with additional discussion of the sentence ramifications of finding for the petitioner. The court notes that the modern trend is to punish solici-

tations, attempts, and completed offenses comparably, citing the Model Penal Code, the Federal Sentencing Guidelines, and sections of the Texas Penal Code. While this may be well and good, the Congress has not seen fit to amend the Uniform Code of Military Justice similarly, and this Court should not permit the court below to do so, surreptitiously, by their holding.

A secondary thrust of the opinion below seems to be that because petitioner did everything he "*thought* not only necessary but possible to make the enterprise successful," 32 M.J. at 73 (emphasis added), he can therefore be punished for the greater offense of *attempted* murder. But attempted murder requires a specific *actus reus*, an overt act towards the actual commission of the crime. While the petitioner may have had the requisite *mens rea*, his failure to do more than solicit and prepare for his wife's murder fails to satisfy the *actus reus* requirement. And as the opinion below correctly points out,

> Since the agent was not a party to the agreement and never intended to endanger the intended victim, none of the actions he took tended to effect the commission of the offense. Therefore, none of his actions, such as getting on the airplane and flying to meet the intended victim, can be charged vicariously to appellant.

32 M.J. at 73 n.6.

The evidence presented in this case is sufficient only to prove the criminal offense of solicitation, not the greater offense of attempted premeditated murder. Neither the petitioner nor the undercover "hit man" ever took any overt acts towards murdering the petitioner's wife. The petitioner had intended that the "hit man" do the overt acts. As an undercover government agent he never did, but rather pretended to so act. All of the acts done by the petitioner were done merely in preparation of what he envisioned the "hit man" would do. Although the terms "attempt" and "solicitation" as used in criminal law are

often confused and sometimes merged, they are by definition distinct offenses. Under Article 80, UCMJ, 10 U.S.C. § 880 (1988), the elements of an attempt are:

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

Manual for Courts-Martial, Part IV, ¶ 4b.

The elements of solicitation under Article 134, UCMJ, 10 U.S.C. § 934 (1988), on the other hand, are:

(1) That the accused solicited or advised a certain person or persons to commit a certain offense under the code other than one of the four offenses named in Article 82;

(2) That the accused did so with the intent that the offense actually be committed; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, Part IV, ¶ 105b.

The variation in the elements underscores the distinction in the crimes each aims to proscribe. An attempt to commit an offense requires a specific intent to commit the particular offense, accompanied by an overt act amounting to more than mere preparation, which directly tends to effect the commission of the intended offense. Art. 80, UCMJ, 10 U.S.C. § 880 (1988). The Manual explains that preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond these

preparatory steps and is a direct movement toward the commission of the offense. M.C.M., Part IV ¶ 4c(2). *See also*, R. Perkins & R. Boyce, *Criminal Law* (3d ed. 1982). The Manual then clearly distinguishes the offense of attempt from that of solicitation by stating in paragraph 4c(4), "soliciting another to commit an offense does not constitute an attempt."

Although there is no litmus test for distinguishing "preparation" from "attempt," in the sphere of inchoate criminal offenses it is clear that not every act will, when combined with criminal intent, suffice to establish the basis for an attempt. To be guilty of an attempt, an accused must have engaged in conduct constituting a "*substantial* step toward *commission* of the crime.'" *United States v. Jackson*, 560 F.2d 112, 116 (2nd Cir.) *cert. denied*, 434 U.S. 941 (1977) (emphasis added); *United States v. Byrd*, 24 M.J. 286 C.M.A. (1987). As Justice Holmes stated in his dissenting opinion in *Hyde v. United States*, 225 U.S. 347, 387-88 (1911), for a criminal attempt, there must be a "dangerous proximity" to success. *See also*, Perkins & Boyce, *supra*.

The petitioner was relying on the "hit man" to take the substantial step toward the commission of the murder, but his status as a Government agent precluded that. As such, there was never a "dangerous proximity" that the murder would succeed. The lower court's contrary opinion goes against a significant weight of authority across several jurisdictions holding that a solicitation, even when accompanied by additional preparatory acts, does not rise to an attempt. *See e.g., State v. Otto*, 102 Idaho 250, 629 P.2d 646 (1981) (payment of $250 to commit murder with promise of more after successful completion of crime held insufficient for "attempt"); *Johnson v. Sheriff, Clark County*, 91 Nev. 161, 532 P.2d 1037 (1975) (offer of $60,000, along with detailed discussion of identity, habits, and residence of proposed victims and details re method of killing and disposing of

bodies held insufficient for "attempt"); *State v. Lourie*, 12 S.W.2d 43 (Mo. 1928) (delivery of drawing and two photographs of husband along with partial payment, to undercover "hit man" held insufficient for "attempt"); *State v. Davis*, 319 Mo. 1222, 6 S.W.2d 609 (1928) (providing undercover "hit man" with photographs of proposed victim, maps where he could be located, and payment of $600 held insufficient for "attempt"); *Hobbs v. State*, 548 S.W. 2d 884 (Tex. Cr. App. 1977) (promise to pay $100 for murder held insufficient for "attempt"); *Hutchinson v. State*, 315 So. 2d 546 (Fla. App. 1975); *People v. Adami*, 36 Cal. App. 3d 452, 111 Cal. Rptr. 544 (1973) (solicitation, discussion, and payment of money to "hit man" held insufficient for "attempt"); *Smith v. State*, 279 So. 2d 652 (Miss. 1973) (directing third party to offer possibility of reward to juror, which direction was refused by the third party, held insufficient to constitute attempt to offer reward to juror); *State v. Miller*, 252 A.2d 321 (Me. 1969).

CONCLUSION

Courts in jurisdictions which authorize far more severe maximum punishments for the crime of attempt than for the crime of solicitation may well be tempted to quasi-legislatively transform the solicitor's urgings into an "attempt." Doing so, however, violates the separation of powers doctrine and the very essence of the requirement that the requisite *actus reus* be proven before criminal liability for the greater offense attaches. In the present case, Special Agent Karnezis never intended to commit the murder, nor did he take any steps toward the actual commission of the murder. The petitioner's steps were limited to preparatory steps. The petitioner never took any steps "in dangerous proximity" to the commission of the planned offense. His acts of hiring the agent, providing payment, maps, and planning the offense were all within the realm of steps recognized by the case law as preparatory. They never reached far enough to constitute

"perpetration." Petitioner is guilty of no more than soliciting another to commit criminal activity. Therefore, his petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 1991

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 63,950

ACM 27324

UNITED STATES,

Appellee,

v.

WILLIAM M. CHURCH, Senior Airman, U.S. Air Force,

Appellant.

Argued Oct. 3, 1990

Decided Jan. 28, 1991

For Appellant: *Major Lynne H. Wetzell* (argued); *Colonel Richard F. O'Hair* (on brief).

For Appellee: *Captain Morris D. Davis* (argued); *Colonel Robert E. Giovagnoni* and *Major Paul H. Blackwell, Jr.* (on brief); *Major Brenda J. Hollis.*

Opinion of the Court

COX, Judge:

A general court-martial comprised of officer and enlisted members convicted appellant, contrary to his pleas, of attempted premeditated murder, in violation of Article 80, Uniform Code of Military Justice, 10 USC § 880. The court-martial sentenced appellant to a dishonorable discharge, confinement for 10 years, total forfeitures, and reduction to airman basic. The convening authority ap-

proved the sentence, and the Court of Military Review affirmed. 29 MJ 679 (1989).

We granted review of this issue:

> WHETHER THE MILITARY JUDGE ERRED IN DENYING TRIAL DEFENSE COUNSEL'S MOTION FOR A FINDING OF NOT GUILTY OF THE CHARGE AND SPECIFICATION OF ATTEMPTED PREMEDITATED MURDER, AS THE EVIDENCE FAILED TO SHOW ANY ACTS ON THE PART OF THE APPELLANT BEYOND MERE PREPARATION, OR THAT ANY ACT OF THE APPELLANT TENDED TO EFFECT THE COMMISSION OF THE INTENDED OFFENSE.

This case involved appellant's attempt to have his wife murdered by a person he mistakenly thought was a hired killer. The question before us, essentially, is whether his actions went far enough to constitute a criminal attempt, as opposed to mere solicitation.[1] We hold that his actions were indeed sufficient, and we affirm.[2]

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[1] The real stake in this appeal is the sentence. If, as appellant contends, he is merely guilty of soliciting murder, the most he can be confined is 5 years. Para. 105e, Part IV, Manual for Courts-Martial, United States, 1984. If, however, he is guilty of attempted murder, the maximum confinement is 20 years (para. 4e, Part IV, Manual, *supra*), with the result that his approved sentence would stand.

Of course, if the facts stood as appellant believed and hoped them to be, he would be guilty as a principal to premeditated murder—and conspiracy as well. Arts. 81 and 118, Uniform Code of Military Justice, 10 USC §§ 881 and 918, respectively. Under those circumstances, the *minimum* term he could have received would have been confinement for life. Art. 118. Fortuitously for all concerned, appellant's efforts were frustrated by law enforcement personnel. Thus, murder (Art. 118) is not applicable because the intended victim is not dead. Conspiracy (Art. 81) is also arguably not available because the *agent* did not actually agree to kill Mrs. Church. *But cf. Saienni v. State*, 346 A.2d 152 (Del.1975).

[2] The granted issue broadly questions the correctness of the judge's ruling denying the defense's motion for a finding of not

Article 80 defines an attempt to commit an offense as "[*a*]*n act* done with specific intent to commit an offense under this chapter [Uniform Code of Military Justice], *amounting to more than mere preparation* and tending, even though failing, to effect its commission." (Emphasis added.)

The Manual for Courts-Martial, United States, 1984, lists the elements for attempt as:

> (1) That *the accused did a certain overt act;*
>
> (2) That the act was done with the specific intent to commit a certain offense under the code;
>
> (3) That *the act amounted to more than mere preparation;* and
>
> (4) That *the act apparently tended to effect the commission of the intended offense.*

Para. 4b, Part IV (emphasis added).

Finally, the phrase "more than preparation" is explained in the Manual in these terms:

> *Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense.* For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt to commit arson to apply a burning match to a haystack, even if no fire results. The overt act need

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guilty. *See* RCM 917(d), Manual, *supra*. Appellate defense counsel, however, has particularly attacked the Court of Military Review's purported adoption of the "slight overt acts" test favored in a minority of jurisdictions for legally defining when an attempt has occurred. We note that the Court of Military Review did not adopt this test but relied instead on paragraph 4, Part IV, Manual, *supra*, and on the decision of this Court in *United States v. Byrd*, 24 MJ 286 (CMA 1987). *See* 29 MJ 679, 685, 686.

> not be the last act essential to the consummation of the offense. For example, an accused could commit an overt act, and then voluntarily decide not to go through with the intended offense. An attempt would nevertheless have been committed, for the combination of a specific intent to commit an offense, plus the commission of an overt act directly tending to accomplish it, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

Para. 4c(2), Part IV (emphasis added).[3]

The military judge properly instructed the members on the elements of the offense. Specifically with respect to "preparation," the judge instructed that the members must find, beyond a reasonable doubt, that appellant

> did a certain act. That is, procuring, assisting, and counseling . . . [the agent] to commit, for payment in United States currency, the premeditated murder of . . . [Mrs. Church] . . . . [And] that the act amounted to more than mere preparation. That is, it was a direct movement toward the commission of the intended offense.

The defense made no objection to this aspect of the instructions.

The members were also properly instructed on the law of solicitation,[4] but evidently they were satisfied on the

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[3] Since the Code was enacted, neither the elements of attempt nor the related Manual commentary has changed in substance, except that a discussion regarding voluntary abandonment was added.

[4] Except for four specific offenses, *see* Art. 82, UCMJ, 10 USC § 882, soliciting another to commit an offense is ordinarily charged under the general article, Art. 134, UCMJ, 10 USC § 934. The Manual for Courts-Martial lists the elements of Article 134 solicitation as:

[Continued]

facts that appellant's actions went beyond mere preparation. The Court of Military Review, with its factual and legal review authority, was also convinced. *See* Art. 66(c), UCMJ, 10 USC § 866(c).

It is said that "[t]he modern doctrine of criminal attempts . . . had its origin in the Court of Star Chamber," which was abolished in 1640. 2 W. Lafave & A. Scott, *Substantive Criminal Law* 18-19 (1986). Apparently, courts have struggled ever since to distinguish between acts constituting mere preparation and those constituting actual attempts. Over the years, courts have developed a variety of "tests" to help them find the dividing line. These tests include: the "proximity approach" (Was "the defendant's act . . . sufficiently proximate to the intended crime"?); the "probable desistance approach" (Would "the act required to establish" an attempt, "in the ordinary course of events" have "result[ed] in the commission of the target crime" but "for the intervention of some extraneous factor"?); and the "equivocality approach" (Could the act have had "other purposes than the commission of" the "specific crime"?). 2 LaFave & Scott, *supra* at 31-36. *See also* G. Williams, *Criminal Law: The General Part* 622-32 (2d ed. 1961); § 5.01, American Law Institute *Model Penal Code and Commentaries* at 321-29 (1985).

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[4] [Continued]

(1) That the accused *solicited or advised* a certain person or persons to commit a certain offense under the code other than one of the four offenses named in Article 82;

(2) That the accused did so with the intent that the offense actually be committed; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Para. 105b, part IV (emphasis added).

In discussing this "preparatory-perpetrating dichotomy," Professors Perkins and Boyce quote the California Supreme Court for this proposition:

> "Between preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made."

People v. Murray, 14 Cal. 160 (1859), quoted in R. Perkins & R. Boyce, *Criminal Law* 617 (3d ed. 1982).

However, as those authors hasten to observe, perhaps prophetically:

> The difference between the two [preparation and attempt] may not be "wide" as a matter of fact. As one approaches the other we may find a difficult "twilight zone" rather than a sharp and clear dividing line.
>
> * * * *
>
> The preparatory-perpetrating dichotomy is useful in discussing situations of a rather general nature, but the actual dividing line between the two is shadowy in the extreme. *There is reason to believe that in close cases the decision is based upon other considerations and that the label attached is that appropriate to the conclusion reached—after it is reached.*

Id. at 617, 621 (footnote omitted; emphasis added).

Not surprisingly, the cases run the gamut, with the result that each party herein can claim the instant facts to be within those of some case.[5]

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[5] For cases tending to support appellant, *see State v. Otto*, 102 Idaho 250, 629 P.2d 646 (1981); *Johnson v. Sheriff, Clark County*, 91 Nev. 161, 532 P.2d 1037 (1975); *State v. Lourie*, 12 S.W.2d 43 (1928); *State v. Davis*, 319 Mo. 1222, 6 S.W.2d 609 (1928); *Hobbs*

In effect, appellant asks us to hold, as a matter of law, that his actions did not amount to more than mere preparation. *See* Art. 67(c), UCMJ, 10 USC § 867(c) (1990). On these facts, which are not in dispute and are more fully set out by the court below, 29 MJ at 681, we decline to so hold.

Essentially, appellant, who was stationed in North Dakota, had been in the market for several months for someone to kill his estranged wife. She lived in Michigan with the couple's 20-month-old son, and her parents, brothers, sisters, and grandfather. Eventually some of appellant's associates in whom he had confided began to take him seriously, and they reported the matter to the Office of Special Investigations (OSI). Shortly thereafter, an undercover OSI agent was presented as a "hit man," and appellant fell for it.

In a motel room meeting in North Dakota, appellant provided the agent with a partial payment; expense money for the round trip flight; annotated street maps of the vicinity of Mrs. Church's residence; diagrams of the house; photographs of Mrs. Church and their son; descriptions of all the people in the house, including where they slept, what kind of cars they drove, and what their work schedules were; as well as the locations of the guns and dogs. Appellant also approved use of the weapon the agent presented, a .22-caliber semi-automatic pistol with silencer, and he expressed a preference where on the

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v. State, 548 S.W.2d 884 (Tex. Cr. App.1977); *Hutchinson v. State*, 315 So.2d 546 (Fla.App.1975); *People v. Adami*, 36 Cal.App.3d 452, 111 Cal.Rptr. 544 (1973).

For cases tending to support the Government, *see United States v. Martinez*, 775 F.2d 31 (2d Cir.1985); *State v. Manchester*, 213 Neb. 670, 331 N.W.2d 776 (1983); *State v. Sodders*, 208 Neb. 504, 304 N.W.2d 62 (1981); *Braham v. State*, 571 P.2d 631 (Alaska 1977); *Saienni v. State, supra; State v. Mandel*, 78 Ariz. 226, 278 P.2d 413 (1954); *Stokes v. State*, 92 Miss. 415, 46 So. 627 (1908); *Howell v. State*, 157 Ga.App. 451, 278 S.E.2d 43 (App.1981); *State v. Gay*, 4 Wash.App. 834, 486 P.2d 341 (App.1971).

victim he wanted the shots placed. The job was to be done while appellant was conspicousuly on duty in North Dakota. Unbeknownst to appellant, the entire conversation was video and audio taped.

Two days later, the agent called appellant from Michigan with the news that appellant's wife had moved and that it would cost more to locate her and accomplish the job. Appellant was apologetic and promptly agreed to the higher amount. He also caused a friend in North Dakota to call telephone Information and obtain his wife's new phone number. The next day the agent called back to tell appellant that he had located the intended victim and that the job would be done shortly. Appellant expressed satisfaction and promised to continue efforts to raise the additional money.

Two days after that, appellant was notified through command channels that his wife had been murdered. Appellant put on "a Class A act" of grief in the unit. That same day, he was notified by the undercover agent to meet him at the North Dakota motel. Appellant arrived, expressed satisfaction with the job done, paid the agent as much of the balance as he had raised, and identified his wife's "body" from a staged photograph. Appellant was then apprehended. This meeting also was video and audio taped. Appellant's conviction of attempted premediated murder was based upon essentially the foregoing evidence.

It is clear that appellant did everything he thought not only necessary but possible to make the enterprise successful—before, during, and after the supposed crime. Looking to his conduct only,[6] we agree the evidence was sufficient for a rational factfinder to find, beyond a reason-

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[6] Since the agent was not a party to the agreement and never intended to endanger the intended victim, none of the actions he took tended to effect the commission of the offense. Therefore, none of his actions, such as getting on the airplane and flying to meet the intended victim, can be charged vicariously to appellant. *See* G. Williams, *Criminal Law: The General Part* 778 (2d ed. 1961).

able doubt, that his actions exceeded mere preparation. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *see generally United States v. Wagner*, 884 F.2d 1090, 1095-96 (8th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1829, 108 L.Ed.2d 958 (1990); *United States v. Candoli*, 870 F.2d 496, 502-3 (9th Cir. 1989); *United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed.2d 812 (1975); *United States v. Watson*, 31 MJ 49, 53 (CMA 1990); *United States v. Johnson*, 30 MJ 53, 57 (CMA 1990); *United States v. Presto*, 24 MJ 350 (CMA 1987); and *United States v. Byrd*, 24 MJ 286 (CMA 1987). Accordingly, the military judge did not err in denying appellant's motion for a finding of not guilty of the Charge and specification of attempted premediated murder.[7]

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[7] These vast distinctions in punishment ceilings among solicitations, attempts, and completed offenses—at least when the crimes are very serious—reflect the traditional view that the punishment should be commensurate with the *resulting harm*, irrespective of the badness of the actor or the seriousness of the threat. The modern approach, on the other hand, focuses on

> the antisocial disposition of the actor and the demonstrated need for a corrective sanction, [with the result that] there is little difference in the gravity of the required measures depending on the consummation or the failure of the plan.

Comment, § 5.05, A.L.I. *Model Penal Code and Commentaries* 490 (1985).

In other words, the trend is to make the punishment levels generally the same or nearly the same for solicitations, attempts, and completed offenses—based upon the badness of the actor, not upon the fortuitousness of the results. *See, e.g.*, § 5.05, Model Penal Code, *supra*; § 2X1.1, Federal Sentencing Guidelines; §§ 12.32(a) and 15.03(d), Vernon's Code of Texas Annotated, Penal Code. Narrowing these vast discrepancies in punishment ceilings would lessen the premium put on factfinder hair-splitting as the evidence proceeds down the continuum of solicitation, conspiratorial agreement, overt act in furtherance of the conspiracy, act beyond mere preparation tending to effect commission of a crime, etc. It would also remove the illogical consequence that the punishment for soliciting premedi-

The decision of the United States Air Force Court of Military Review is affirmed.

Senior Judge EVERETT concurs.

SULLIVAN, Chief Judge (concurring):

I agree with Judge Cox' practical approach to determining the "actus reus" necessary for conviction of attempt under Article 80, Uniform Code of Military Justice, 10 USC § 880. It focuses on the totality of circumstances of a particular case and not on linguistic formulations. *See United States v. Wagner*, 884 F.2d 1090, 1096 (8th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1829, 108 L.Ed.2d 958 (1990). Such an approach is consistent with prior military case law. *See United States v. Johnson*, 7 USCMA 488, 493-94, 22 CMR 278, 283-84 (1957); *United States v. Choat*, 7 USCMA 187, 191-92, 21 CMR 313, 317-18 (1956). It is also consistent with Federal case law which is noted in our earlier decisions. (7 USCMA at 494, 22 CMR at 284; 7 USCMA at 191, 21 CMR at 317) *See United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950), *cert. denied*, 342 U.S. 920, 72 S.Ct. 362, 96 L.Ed. 688 (1952). Finally, it is consistent with later Federal case law which we have recently cited with approval in *United States v. Presto*, 24 MJ 350, 352 (CMA 1987). *See United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed.2d 812 (1975).

Appellant's argument for a more dogmatic approach strictly delineated by the state court decision in *State v. Davis*, 319 Mo. 1222, 6 S.W.2d 609 (1928), must be rejected. That vintage decision is neither controlling nor persuasive. *See generally United States v. Thomas*, 13 USCMA 278, 286, 32 CMR 278, 286 (1962). It also does

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tated murder can be no greater than that for soliciting the making of a check of $101 without sufficient funds. *See* para. 49e(1)(b), Part IV, Manual, *supra*.

not reflect "established principles of criminal law," so far as I can discern them. *See generally United States v. Mandujano, supra* at 373 n. 5; *State v. Molasky*, 765 S.W.2d 597, 600-01 (Mo. banc 1989); *see State v. Kilgus*, 128 N.H. 577, 519 A.2d 231 (1986); *cf. State v. Otto*, 102 Idaho 250, 629 P.2d 646 (1981). Moreover, nothing in paragraph 4b or c, Part IV, Manual for Courts-Martial, United States, 1984, requires adoption of that particular state court decision. Finally, I could not consider such a Manual provision controlling if it conflicted with our case law interpreting Article 80. *See United States v. Watson*, 31 MJ 49, 52 (CMA 1990).

Turning to the record, I also must disagree with appellant's self-serving characterization of the evidence as merely showing acts of solicitation. As noted by Judge Cox, the evidence shows that appellant solicited someone to murder his wife, paid that person money, participated in planning the murder, provided information to facilitate its commission, and finally gave the go-ahead approval on the day the expected murderer was actually ready to commit the crime. Evidence of the act of final approval distinguishes this case from *State v. Davis*, *supra* and, in any event, clearly satisfies the "more than mere preparation" and "tending . . . to effect its commission" standards found in Article 80. *See United States v. Johnson* and *United States v. Coplon*, both *supra*. Accordingly, I agree with Judge Cox that there was sufficient evidence in this case for a rational juror to find this element of the offense beyond a reasonable doubt. *United States v. Martinez*, 775 F.2d 31, 35 (2d Cir. 1985). *Cf. United States v. Candoli*, 870 F.2d 496, 503 (9th Cir. 1989); *United States v. Buffington*, 815 F.2d 1292, 1303 (9th Cir. 1987).

APPENDIX B

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 27324

UNITED STATES

v.

SENIOR AIRMAN WILLIAM M. CHURCH,
FR 279-58-8055 United States Air Force

Sentence Adjudged 16 Sept. 1988
Decided 26 Oct. 1989

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Major Lynne H. Wetzell.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni and Captain Morris D. Davis.

Before LEWIS, BLOMMERS and KASTL, Appellate Military Judges.

DECISION

BLOMMERS, Judge:

Before a general court-martial with members, the appellant, contrary to his pleas, was found guilty of the attempted premeditated murder of his wife in violation of Article 80, UCMJ, 10 U.S.C. § 880.[1] His sentence, as

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[1] He was also charged with attempted conspiracy to commit premeditated murder, but the military judge granted a defense motion

adjudged and approved, extends to a dishonorable discharge, confinement for ten years, forfeiture of all pay and allowances, and reduction to airman basic (E-1). The principal issue raised before us is framed by appellate counsel as follows:

> WHETHER THE MILITARY JUDGE ERRED IN DENYING TRIAL DEFENSE COUNSEL'S MOTION FOR A FINDING OF NOT GUILTY OF THE CHARGE AND SPECIFICATION OF ATTEMPTED PREMEDITATED MURDER, AS THE EVIDENCE FAILED TO SHOW ANY ACTS ON THE PART OF THE APPELLANT BEYOND MERE PREPARATION, NOR THAT ANY ACT OF THE APPELLANT TENDED TO EFFECT THE COMMISSION OF THE INTENDED OFFENSE.

Simply stated, it is asserted that the evidence is not sufficient to support findings of guilty of attempted murder. We disagree and affirm. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

This case involves contracting out for the commission of a crime. As appellate counsel note, the facts of this case present an issue of first impression for the military appellate courts in applying principles of law relating to "attempt" crimes. The specification in question alleges that the appellant "did, at Grand Forks Air Force Base, North Dakota, from on or about 25 April 1988 to on or about 26 April 1988, attempt to, with premeditation, murder . . . [his wife] by procuring, assisting, and counseling Nicholas J. Karnezis to commit, for payment in

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to dismiss that offense as being multiplicious with the offense of attempted premeditated murder. We also note that there can be no conspiracy when a supposed participant merely feigns acquiescence in the criminal venture to secure another's detection and apprehension by proper authorities. *United States v. LaBossiere*, 13 U.S.C. M.A. 337, 32 C.M.R. 337 (1962).

United States currency, the premeditated murder of the said . . . [wife]." In order to be found guilty of an attempt, the evidence must establish "a specific intent to commit the offense accompanied by an overt act which directly tends to accomplish the unlawful purpose." MCM, Part IV, para. 4c(1) (1984). The act in question must amount to more than mere preparation to commit the offense.[2] A solicitation to commit an offense in violation of Article 134, UCMJ, 10 U.S.C. § 934, on the other hand, is committed if one counsels or advises another to commit an offense with the specific intent that the offense solicited be committed. No overt act directly tending to accomplish the unlawful purpose is required. During oral argument, appellate defense counsel conceded that the appellant is guilty of soliciting another to commit murder, but argued forcefully that he was not guilty of attempted murder because no act beyond mere preparation was proven.[3] To resolve this matter, it will be necessary to review the evidence of record in some detail.

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[2] Other parts of paragraph 4c, Part IV of the Manual provide the following guidance:

> (2) *More than preparation.* Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense. For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt to commit arson to applying [sic] a burning match to a haystack, even if no fire results. The overt act need not be the last act essential to the consummation of the offense. For example, an accused could commit an overt act, and then voluntarily decide not to go through with the intended offense. An attempt would nevertheless have been committed, for the combination of a specific intent to commit an offense, plus the commission of an overt act directly tending to accomplish it, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.
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> (3) *Factual impossibility.* A person who purposely engages in conduct which would constitute the offense if the attendant circumstances were as that person believed them to be is guilty

Facts

The appellant and his wife were married in 1985, and a son was born of this union about a year later. In 1987, they experienced marital difficulties which eventually led to their separation. By an order dated 5 October 1987, the local district court awarded custody of the child to the appellant's wife, and shortly thereafter she returned with the child to her home in Michigan. The appellant loved his son and desired to regain custody of him, but began to realize it was unlikely he would be able to do so through the courts.

Sometime between Thanksgiving and Christmas of 1987, the appellant, a security policeman, asked Senior Airman Mohon, a former co-worker, if he knew anyone the ap-

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of an attempt. For example, if A, without justification or excuse and with intent to kill B, points a gun at B and pulls the trigger, A is guilty of attempt to murder, even though, unknown to A, the gun is defective and will not fire. Similarly, a person who reaches into the pocket of another with the intent to steal that person's billfold is guilty of an attempt to commit larceny, even though the pocket is empty.

(4) *Solicitation.* Soliciting another to commit an offense does not constitute an attempt . . .

The Analysis to the 1984 Manual indicates that these provisions are based on paragraph 159 of the 1969 Manual. MCM, App. 21, para. 4 at A21-83 (1984). Paragraph 159 provided in part:

> An accused may be guilty of an attempt even though the commission of the intended offense was impossible because of unexpected intervening circumstances or even though the consummation of the intended offense was prevented by a mistake on the part of the accused. The physical impossibility of committing the intended crime does not constitute a defense.

MCM, 1969 (Rev.), para. 159 at 28-7.

[3] Among other punishments, confinement for 20 years is authorized for attempted murder, whereas the period of confinement authorized for soliciting another to commit murder is 5 years. At trial, the parties agreed that solicitation to commit murder was a lesser included offense to the attempt as charged, and the court members were appropriately so instructed.

pellant could hire to kill his wife. Mohon did not take the appellant seriously. Sometime in January 1988, Senior Airman Kowalkowski, a co-worker, and the appellant were talking about the appellant's marital difficulties, and the appellant commented that he would be better off if his wife was dead. Shortly thereafter, during another conversation, the appellant asked Kowalkowski if he had any friends from a big city. Kowalkowski did not take the appellant seriously either.

On about 31 March 1988, Airman Meyer, another co-worker, was talking with the appellant in the hallway of their dormitory. The appellant said that since Meyer was from a big city, he wondered if Meyer knew anybody who could do a job for him. Knowing the appellant's family situation, Meyer believed the appellant was talking about getting someone to kill his wife so he could regain custody of his son. Meyer replied that he would check around and make some calls, but really did not take the appellant seriously. A couple of days later he made one call to a friend back in New York in the appellant's presence. He asked his friend, "Do you know anybody that you could find to eliminate this guy's wife so he can get custody of his kid?" The appellant gave no indication he had just been kidding around or joking when Meyer asked this question. On another occasion when Meyer was present, the appellant made a rough drawing of the residence where his wife was living and explained how easily someone could gain access to it. On about 6 April, Meyer went with the appellant to the city of Grand Forks to pick up tax returns. During the trip, the appellant said he was expecting an $800.00 refund and implied it could be used to pay for his wife's killing.

On 7 April 1988, Sergeant Skyberg, a co-worker and friend, received a message that the appellant wanted to talk to him. Skyberg phoned the appellant and asked him what he wanted to talk about. The appellant indicated that the matter was too private to discuss over the phone,

and Skyberg arranged to meet the appellant at his dormitory room. After Skyberg arrived, the appellant asked him if he knew anyone "who could . . . [the appellant gestured with his hand, his fingers arranged as if to simulate a gun] his wife." The appellant indicated that he felt that was the only way he could get custody of his son. He said he was getting out of the service in about a month, and wanted "it" done before he left so he would have a good alibi as to where he was at the time. Skyberg believed the appellant was serious. A few other airmen, including Airman Meyer, entered the room and they changed the subject of conversation. After all had left except Skyberg and Meyer, the conversation about the appellant's wife was resumed. The appellant talked in more detail about the location of his wife's home in Michigan, and a hotel close by where someone doing the job could stay. He indicated her house was up for sale, so someone could easily get inside by posing as a prospective buyer. He said he could provide a detailed map of the area, and would be able to raise "a few grand" for the job. The appellant said this was not a spur of the moment thing, but something he had been thinking about for the last few months. Meyer indicated that he had tried to contact someone on the appellant's behalf. After leaving the appellant's room, Skyberg and Meyer discussed the matter further and decided to contact the Office of Special Investigations (OSI).

After talking with Skyberg and Meyer the following day, OSI decided to open up an investigation and attempt to place an undercover agent in the role of a hit man. Meyer agreed to assist them by introducing the appellant to the undercover agent. On 15 April 1988, Meyer was instructed to contact the appellant and tell him that his [Meyer's] friend in New York had found someone to do the job if the appellant was still interested. The appellant indicated he was, and Meyer told him an individual by the name of "Nick" (in reality, Special Agent Nicholas

J. Karnezis) would call him on the evening of 19 April. The appellant subsequently borrowed $400.00 from Meyer (money provided by OSI) to help pay the hit man.

Nick called the appellant as planned, and indicated they had some business to discuss. Nick related that he would need a picture of the appellant's wife, a sketch of the house, and maps of the local area in Michigan. The appellant said he already had the picture and a detailed diagram of the residence, and that he could get the maps. Nick indicated he would need $500.00 up front for expenses. It was agreed they would meet at the Holiday Inn in Fargo, North Dakota on 22 April 1988, and that the appellant would wear an Ohio State football jacket and carry a *Time* magazine so Nick could recognize him.

The meeting occurred as planned. After some discussion about his family situation, the appellant indicated he wanted his wife killed. The appellant said he had brought the things Nick had asked for and had $1,100.00 with him, $500.00 for the job, plus $600.00 for air fare. After discussing the location of the appellant's wife's residence, Nick simulated a phone call to an airline ticket agent, booking a flight to Marquette, Michigan. The appellant provided Nick with pictures of his wife and son; a spiral notebook containing a list of people who lived in the house and hours they were away from home, two detailed diagrams of the house and surrounding area, and directions on how to get to the house from the Marquette airport; a Rand-McNally road atlas with two different routes from the airport to the house highlighted; and, a local Marquette area phone book, which included the phone number at his wife's home. They discussed the schedules of the residents, the vehicles they drove, where the dogs were located, closets in the house where guns were kept, and other details of the planned murder. They settled on a total price of $2,100.00 if the job went as easily as the appellant indicated it should. The appellant gave Nick the $1,100.00 he had brought with him.

Nick asked for ideas on how the killing should be done, and the appellant said it seemed to him the easiest way was to make it look like a robbery and that his wife got in the way. As to the weapon, he indicated a knife or gun could be used. Nick showed the appellant a .22 caliber semi-automatic pistol, equipped with a silencer, that he had in his brief case. Nick asked the appellant if he had any "special requests" as to how he wanted it done. The appellant replied "one in her head and one in her . . ." (using a slang term for a private part of the female anatomy). Nick expressed concern about the appellant's wife's grandfather, who also lived in the house and did not work. The appellant indicated there should be no witnesses, and that if the grandfather got in the way Nick should take care of him too. The appellant indicated he wanted the job done while he was at work so he would be very visible. He provided Nick with his work and dormitory phone numbers, and Nick said he would be in touch, and for the appellant to expect a call around 8:00 to 8:30 p.m.

Nick called the appellant from K.I. Sawyer Air Force Base, Michigan (a base located close to Marquette) on 24 April. He told the appellant that his wife had moved, and that the job would cost more, another $500.00, since he would have to locate where she was living. The appellant agreed to pay the additional amount. That evening the appellant asked Airman Meyer to call directory assistance in Michigan for him to find out his wife's new phone number. Meyer did, and gave the new number to the appellant. (A fair inference is that the appellant obtained the number so he could provide it to Nick if Nick was unable to locate the appellant's wife on his own.) Nick called again the following day, indicating he had located the appellant's wife and that the job would be done between then and the following morning. The appellant said that was fine. He indicated he had the other $1,000.00, but that it would take a little longer to come up with the additional $500.00.

On the morning of 26 April, the appellant was notified of his wife's death by his unit commander. According to Airman Meyer, the appellant told him that everyone was sympathetic and that the appellant put on "a Class A act," including crying and laying down on the first sergeant's couch. Later that day, the appellant received a message to meet Nick down in Fargo. He proceeded to the Holiday Inn in Fargo. He told Nick he had received notification of his wife's death. Nick said: "You mean you got the word already?" And the appellant replied: "You do good work." Nick showed the appellant a picture of his wife laying on the floor with what appeared to be two bullet wounds, one in her head and another in her neck. The appellant confirmed that it was his wife. After some further discussion, he gave Nick $1,000.00. At that point Nick identified himself as a government agent and apprehended the appellant. The two meetings between the appellant and Nick at the Holiday Inn were both video and audio tape recorded (the tapes were admitted in evidence at trial).

An Attempt or Only a Solicitation?

On the appellant's behalf, it is forcefully argued that his conduct never passed the threshold from mere preparation (i.e., a solicitation) to an attempt to commit the offense because there was no "dangerous proximity" to success of the planned murder. *See Hyde v. United States*, 225 U.S. 347, 388, 32 S.Ct. 793, 810, 56 L.Ed. 1114, 1134 (1911) (Justice Holmes dissenting); Perkins, *Criminal Law* 572 (2d Ed.1969). Since there is little military authority on point, appellate counsel rely principally on state court approaches to this dilemma.[4] *See*,

[4] Our research has revealed only two reported military cases involving a factual situation (contract murder) similar to the one present in this case. *United States v. Vanderlip*, 28 M.J. 1070 (N.M.C.M.R.1989); *United States v. Jones*, 14 M.J. 740 (A.F.C.M.R. 1982). In both those cases the accused was charged with soliciting another to commit murder, not attempted murder. They are not

e.g., *State v. Otto*, 102 Idaho 250, 629 P.2d 646 (1981); *Hobbs v. State*, 548 S.W.2d 884 (Tex.Ct.App.1977); *Johnson v. Sheriff, Clark County*, 91 Nev. 161, 532 P.2d 1037 (1975); *Hutchinson v. State*, 315 So.2d 546 (Fla. App.1975); *People v. Adami*, 36 Cal. App.3d 452, 111 Cal.Rptr 544 (1973); *Smith v. State*, 279 So.2d 652 (Miss.1973); *State v. Miller*, 252, A.2d 321 (Me.1969); *State v. Lourie*, 12 S.W.2d 43 (Mo.1928); *State v. Davis*, 319 Mo. 1222, 6 S.W.2d 609 (1928). In various factual situations involving "contracting out" for crimes, these courts held that the evidence only established mere acts of preparation not leading directly or proximately to consummation of the intended crime.[5] For example, in *Adami* the Court concluded that "the contemplated murder would not have resulted in the usual course of natural events since neither the 'agent' nor the solicitor [defendant] did any unequivocal overt act which can be said to be a commencement of the commission of the intended crime." *People v. Adami*, 111 Cal.Rptr. at 548.

Typical, and perhaps closest factually to the present appellant's case, are the companion cases of *Davis* and *Lourie*. They involved a plan hatched by two lovers to murder the woman's husband (Edmon Lourie) so that they could get his life insurance amounting to $66,000.00. The parties resided in Kansas City, Missouri. In furtherance of their plan, Davis engaged a man named Leverton to find an ex-convict who would commit the murder for hire. However, Leverton disclosed the plot to the police. Thereafter, several meetings were held between Davis, Leverton and an undercover police officer, Dill. It was

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dispositive of the issue we face. *See also United States v. Thomas*, 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962) for an excellent and extensive discussion of the various principles developed by courts and legal scholars in an effort to deal with attempt crimes where impossibility of completion of the substantive crime is involved.

[5] It should be recognized that many of these decisions rest, at least in part, upon interpretation of state statutes.

agreed that Dill would kill Mr. Lourie for $600.00 and diamonds valued at about $3,000.00 owned by the Lourie's. Also, arrangements were made for Dill to meet Mrs. Lourie so they would be able to recognize each other. It was decided that the contemplated assault would occur in Chicago, where Mr. Lourie had gone on business. Davis provided Dill a map showing where Mr. Lourie could be located and two photos of him. If Dill could not locate him, Mrs. Lourie would also travel to Chicago to assist. However, this part of the plan was interrupted when Mr. Lourie returned early from his trip. It was then decided that Mrs. Lourie would persuade her husband to go out for a night on the town, and that they would leave their home at 8:00 p.m. on a certain date. Mrs. Lourie was to have the diamonds on her person so it would appear that robbery was the motive for the crime. She would be "mussed up", and then faint, permitting Dill time to escape. On the evening in question, Dill, accompanied by three other police officers, proceeded to the Lourie residence as planned. The Lourie's were dressed and ready to leave; Mrs. Lourie had the diamonds on her person. Davis, also as planned, was at home in another part of the city in order to have an alibi. Two of the officers entered the residence and took charge of the Lourie's, while Dill and the other officer proceeded to Davis' residence and arrested him. The Supreme Court of Missouri concluded:

> The employment of Dill as agent to murder Lourie was not tantamount to an attempt. Dill not only had no intention of carrying out the expressed purpose of defendant, but was guilty of no act directly or indirectly moving toward the consummation of the intended crime. He did nothing more than listen to the plans and solicitations of defendant without intending to act upon them. It was not shown that Dill committed an act that could be construed as an attempt. The arrest of Lourie, his wife, and defendant as detailed in the evidence could not be said to be an

act involving the consummation of the crime. (Citations omitted.)

State v. Davis, 6 S.W.2d at 612. The Court adopted the same rationale in its decision in *State v. Lourie*. The Court acknowledged that the defendants were guilty of soliciting another to commit murder, a crime not charged. (Apparently under Missouri law that offense is not a lesser included offense to murder or attempted murder.)

Not all authority favors the defense position. A few state courts have upheld attempt convictions in cases involving crimes for hire. *See, e.g., Braham v. State*, 571 P.2d 631 (Alaska 1977), *cert. denied* 436 U.S. 910, 98 S.Ct. 2246, 56 L.Ed.2d 410 (1978); *State v. Gay*, 4 Wash. App. 834, 486 P.2d 341 (1971); *State v. Mandel*, 78 Ariz. 226, 278 P.2d 413 (1954); *Stokes v. State*, 92 Miss. 415, 46 So. 627 (1908). These cases stand for the proposition that once the intent that a crime be committed is clearly proved, "slight acts" on the part of the solicitor will support an attempt conviction. For example in *Gay*, payment by the solicitor was considered a sufficient overt act directed toward commission of the intended crime.

Appellate defense counsel urge that it would be inappropriate to adopt this minority view under military law. Doing so, it is argued, would violate "the very essence of the requirement that a sufficient *actus reus* be proven before criminal liability will attach." Perhaps so, because our law requires "a direct movement toward the commission of the offense," and provides that "[s]oliciting another to commit an offense does not constitute an attempt" (though solicitation can be a lesser included offense). MCM, Part IV, para. 4c (1984).[6]

We are not convinced, however, that military law should extend so far as to hold that a factual situation such as that present in the *Davis* and *Lourie* cases will

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[6] *See* Annotation, *What Constitutes Attempted Murder*, 54 ALR 3d 612 (1974) for an extensive discussion of this subject.

not constitute an attempt to commit a crime. In this regard, we find solace in the reasoning of some of the dissenters in the foregoing cases. In *Davis*, Chief Justice Walker wrote: "Without limitation it may be said that the defendant did everything within the contemplation of malicious human ingenuity to enable the putative murderer to commit the crime, short of actual participation therein." *State v. Davis*, 6 S.W.2d at 616. In *State v. Otto* (defendant soliciting undercover agent to commit murder, paying him $250.00 up front with promise of larger sum after crime was committed, not sufficient to support conviction of attempted murder), Chief Justice Bakes observed:

> [T]he acts here went far beyond an offer of "employment" [a solicitation] . . . . [T]he type of weapon to be utilized and the manner in which the hit was to be made were discussed, an agreement was reached, payment was made, and the defendant completed all necessary steps preliminary to the "hit" being made.
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> The real question is whether acts of preparation when coupled with intent have reached a point at which they pose a danger to the public so as to be worthy of law's notice.
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> * * * *
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> Whether a person takes on for himself the task of trying to kill another person, or tries to bring about that killing through hiring another to perform the deed, is in actuality nothing but a matter of personal choice. While the principal is guilty of murder when the contract is performed, an attempt has been made when the bargain is struck. . . . If criminals are going to contract out their services, and if there are persons who will retain those services, there is no reason why the criminal courts should decline to respect those contracts.

State v. Otto, 629 P.2d at 653-654.

To a great extent, resolution of the issue we face is dependent upon the facts of the case. *United States v. Stallworth*, 543 F.2d 1038, 1039 (2d Cir.1976); 40 Am. Jur.2d 830. We hold that under the circumstances present in the case now before us, the appellant's conviction of attempted murder can be sustained. We have found no military or federal precedent which we believe would require us to reach the opposite conclusion.

As this Court has recently stated, "a criminal attempt attaches culpability to a state of mind consisting of an accused's criminal intent and the belief that he is acting in such a manner as to achieve that intent." *United States v. Guevara*, 26 M.J. 779, 781 (A.F.C.M.R.1988). In *United States v. Byrd*, 24 M.J. 286, 290 (C.M.A. 1987), the United States Court of Military Appeals relied upon a test adopted by the United States Court of Appeals for the Second Circuit:

> [T]o be guilty of an attempt, a 'defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime' and that '[a] substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent.' *United States v. Jackson*, 560 F.2d 112, 116 (2d Cir.), *cert. denied*, 434 U.S. 941, 98 S.Ct. 434, 54 L.Ed.2d 301 (1977); *see also United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir.1974), *cert. denied* 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed.2d 812 (1975); ALI Model Penal Code, Sec. 5.01 (1962).

See also United States v. Stallworth, 543 F.2d 1038 (2d Cir.1976); *United States v. Thomas*, 13 U.S.C.M.A. 278, 32 C.M.R. 278, 285-286 (1962). The Court of Military Appeals most recently affirmed reliance upon this test in *United States v. Hyska*, 29 M.J. 122 (C.M.A.1989)—but the Court did not apply the test to the facts of the case as it was decided on other grounds. *See also United States v. Presto*, 24 M.J. 350 (C.M.A.1987).

In *Mandujano*, an informant introduced an undercover narcotics agent to the defendant. After some general conversation the subject turned to drugs. The agent said he was from out of town, and was looking for an ounce sample of heroin to determine the quality of the material in the local area. Mandujano replied that he could get good brown Mexican heroin for $650.00 an ounce. He indicated he had a good contact, but would need the money up front. The agent gave Mandujano $650.00, and he departed. He returned about an hour later, explained that he was unable to locate his contact, and gave the money back to the agent. The Court found that the request for and receipt of the $650.00 from the agent constituted "a substantial step toward distribution of heroin." *United States v. Mandujano*, 499 F.2d at 379. Thus, the jury's verdict of guilty of an attempt to distribute heroin in violation of 21 U.S.C. § 846 was upheld. The Court, noting that the statute did not define an "attempt," assessed the case law and concluded that in order to constitute a criminal attempt, the defendant must have (1) acted "with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting," and, (2) "engaged in conduct which constitutes a substantial step toward commission of the crime. A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent." *Id.* at 376-377. This test was derived in large part from the Model Penal Code standard.[7]

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[7] Section 5.01 of the ALI Model Penal Code addresses criminal attempt. It provides in part:

> (3) *Conduct Designed to Aid Another in Commission of a Crime.* A person who engages in conduct designed to aid another to commit a crime which would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

Section 2.06 deals with liability for conduct of another.

United States v. Jackson, supra, involved an attempted bank robbery. The Court examined various approaches taken in an effort to distinguish preparation from attempt, and then affirmed the trial court's use of the *Mandujano* test. The Court noted that once criminal intent is established, the key question remaining is "the substantiality of the steps taken . . . and how strongly this corroborates the firmness of . . . [the] obvious criminal intent." 560 F.2d at 120. This determination is a matter of degree, and a mixed question of law and fact.

As noted above, the Court of Military Appeals applied the *Mandujano/Jackson* test in *United States v. Byrd, supra.* Byrd met SP4 Calloway (who was a drug suppression team member, though Byrd did not know this at the time) at the Community Center on Fort Gordon, Georgia. After some general conversation, Byrd mentioned something about marijuana. Calloway asked Byrd if he could get some marijuana for him. Byrd said he knew someone who could get him a five dollar bag for ten dollars. Byrd attempted to contact a certain taxi cab driver for this purpose, but found out he was not working that day. He told Calloway to meet him at the Community Center the following day. When they met, Calloway was accompanied by an undercover military police investigator who was posing as an individual interested in obtaining drugs. Byrd took them to another location on post and introduced them to the cab driver Byrd knew. The cab driver told them he could get marijuana for them for ten dollars. The investigator then gave Byrd ten dollars. It was agreed that Byrd would meet the investigator at the Community Center in half an hour with the marijuana. The cab driver then took Byrd to an off-post liquor store where marijuana was sold. The stipulation of fact in this guilty plea case provided: "The accused purchased a bottle of liquor with the money . . . [the investigator] gave him because he was afraid he'd be caught if he tried bringing marijuana back on post."

During the providence inquiry, Byrd explained that on the way to the liquor store he decided not to purchase any marijuana. He did not want to get a reputation as a drug peddler.

Based upon these facts, the Court of Military Appeals found that Byrd's guilty plea to attempted distribution of marijuana was improvident. Receipt of $10.00 from the undercover agent and traveling to a liquor store where marijuana could be purchased did not constitute conduct going beyond preparation. The Court concluded:

> Riding to the liquor store with the other occupants of the taxi-cab was not 'strongly corroborative of the firmness of' Byrd's intent to distribute marijuana. The act is simply too ambiguous; and too many other steps remained before the distribution could be consummated.

United States v. Byrd, 24 M.J. at 290. We believe that Byrd's renunciation of his criminal purpose was an important factor to the outcome in his case. Chief Judge Everett, writing for the Court, discussed the principle of renunciation and the defense of voluntary abandonment in some detail. *Id.* at 290-293.

In *United States v. Presto*, *supra*, the accused, pursuant to his pleas, was found guilty of the attempted sale of three kilograms of marijuana. He had previously sold over 500 grams of marijuana to two acquaintances, one a confidential source, the other an undercover agent. They asked if he could get them an additional ten kilograms. He agreed to try to do so, but told them he doubted he could get more than two or three kilograms. He contacted the people he had dealt with, who indicated they would try to get the ten kilograms. A couple days later he contacted them again, but they did not have it yet. Later that day he was arrested. The Court stated: "Although placing a call to a potential source in order to determine the availability of drugs tends to corroborate appellant's

criminal intent, we are unconvinced that the statutory requirement of 'more than mere preparation' has been met." *United States v. Presto*, 24 M.J. at 352. The Court relied upon the test adopted in *Byrd* in reaching this conclusion. In the case now before us, the appellant's acts far exceed those of the accused in *Byrd* and *Presto*.

Conclusion

Applying the test adopted in *Byrd* and the principles set forth in the Manual (MCM, Part IV, para. 4 (1984)), we are convinced that the trial court's findings of guilty of the offense of attempted murder should be upheld. *See also* Article 66(c), UCMJ. The appellant's conduct in obtaining the services of Nicholas Karnezis to murder his wife, his detailed participation in planning the intended crime, up to advising the agent exactly how he wanted his wife shot, and his payment of the agreed upon consideration, both before the crime was to occur and after he was apprised that it had, constitutes "a substantial step toward commission of the crime," and establishes the requisite overt act amounting to more than mere preparation. We can envision nothing else the appellant could possibly have done to effect what he believed would be his wife's murder, short of committing the act himself (which is precisely what he did not want to do). As characterized by appellate government counsel during oral argument, the appellant armed a missile (Nick) and fired it off, fully believing it was aimed directly at his intended victim. *See United States v. Keenan*, 18 U.S.C.M.A. 108, 39 C.M.R. 108, 113 (1969). Or, using an example contained in the Manual: "if A, without justification or excuse and with intent to kill B, points a gun at B and pulls the trigger, A is guilty of attempt to murder, even though, unknown to A, the gun is defective and will not fire." MCM, Part IV, para. 4c(3) (1984). If we were to accept the reasoning of appellate defense counsel—"neither appellant nor SA Karnezis ever took any steps or perpetration in dangerous proximity to the commission of

the offense planned" because the agent never intended to commit the offense—no contract for hire criminal scheme could ever be prosecuted as an attempt if the person hired turned out to be a government agent or informant. *Cf. United States v. Johnson*, 7 U.S.C.M.A. 488, 22 C.M.R. 278, 283 (1957). To place our criminal justice system in this posture defies logic. It is the accused's criminal intent we are concerned with, not that of the person hired to commit the crime. *United States v. Guevara, supra.*

Turning to that intent, we find the record replete with evidence establishing "conduct strongly corroborative of the firmness of the defendant's criminal intent." The appellant retained whom he believed to be a big city hit man for the purpose of murdering his wife; he paid an agreed upon amount of money up front; he provided photographs, documents and diagrams to facilitate commission of the crime; he helped plan precisely how it would be committed; he indicated the need for an alibi for himself; after being advised that his wife had moved, he agreed to an increase in the contract price and obtained her new telephone number; when notified of her murder through unit channels, he "put on a Class A act;" upon being shown a staged picture of his wife with gun shot wounds, he commended Nick for his "good work," and paid a further installment on the contract price. The firmness of his intent is clearly established.[8]

We are convinced beyond a reasonable doubt that the appellant is guilty of attempted murder. We further find

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[8] The defense theory at trial was that Senior Airman Church was a peaceful, happy-go-lucky individual, hurting from a difficult divorce, who fell victim to an OSI machine. His counsel forcefully argued this position on his behalf. "This machine was used to scare, intimidate, and overwhelm Airman Church to go along with the plan that was designed and created by the OSI. The situation was induced. They created an offense where there never was one." The military judge provided the members proper instructions on the defense of entrapment. By their findings, the jury determined this defense did not exist. We agree.

the sentence to be appropriate for commission of this crime. Our attention has also been invited to issues raised at trial which centered around the composition of the court panel. We find them to be without merit. *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed2d 1250 (1959); *United States v. Smith*, 27 M.J. 242, 250 (C.M.A.1988); *United States v. Cunningham*, 21 M.J. 585 (A.C.M.R.1985), *pet. denied*, 22 M.J. 275 (C.M.A.1986); *United States v. Townsend*, 12 M.J. 862 (A.F.C.M.R.1981); Article 25, UCMJ, 10 U.S.C. § 825; R.C.M. 502(a)(1), 503(a)(1).

One other matter warrants brief comment. As noted early on in this opinion, the attempted murder specification alleged that the crime occurred "at Grand Forks Air Force Base," yet the evidence established that the two meetings between the appellant and Nick took place in a motel room in Fargo, North Dakota, a distance of some 78 miles from Grand Forks, North Dakota, where the base is located. Additionally, the dates alleged in the specification were on or about 25-26 April 1988, but the key meeting between Nick and the appellant where plans for this crime were made occurred on 22 April. We do not find these to be fatal variances between pleadings and proof. The companion attempted conspiracy charge dismissed by the military judge alleged that the offense occurred between 19-22 April 1988 at both Grand Forks Air Force Base and Fargo. Clearly, the appellant was in no way misled so as to affect his ability to adequately prepare for trial, and he will be fully protected against another prosecution for the same offense. Therefore, there is no prejudice. *United States v. Lee*, 1 M.J. 15 (C.M.A. 1975); *United States v. Rath*, 27 M.J. 600 (A.C.M.R. 1988); *United States v. Mendoza*, 18 M.J. 576 (A.F.C.M.R. 1984).

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the

appellant was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Senior Judges LEWIS and KASTL concur.

Senior Judge LEWIS took final action on this case prior to his retirement.

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